No. 14,905

United States Court of Appeals
For the Ninth Circuit

ALFREDO RAMIREZ GARCIA,

Appellant,

vs.

HERBERT BROWNELL, Attorney General of the United States, and ALBERT DEL GUERCIO, Officer in Charge, Immigration and Naturalization Service at Los Angeles, California,

Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

DAVID C. MARCUS,
215 West Fifth Street, Los Angeles, California.
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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PLEADINGS.

On May 3, 1955, Alfredo Ramirez Garcia filed his "Petition for Declaratory Judgment and for Determination of United States Citizenship", alleging and contending that he is a constitutional citizen of the United States under the Fourteenth Amendment of the Constitution of the United States, born at Gardena, California, on the 27th day of March, 1926 (Tr. 4). He further alleged that he sought admission into

the United States in the year 1943 at the port of entry at San Ysidro, California, claiming his United States citizenship, but was denied admission for the reason that he was not in possession of or presented an official birth certificate, but only presented his baptismal certificate showing such birth (Tr. 4). He further alleged numerous demands to effect admission into the United States, but was denied such right of entry; that in 1946, when he finally secured a copy of his birth certificate, he presented said birth certificate on the 1st day of July, 1946, to officers of the Immigration Service and was permitted to enter the United States as a native born citizen (Tr. 5-6). He further alleged that immediately upon his entrance he registered for military service under the Selective Service and Training Act (Tr. 6).

In September, 1946 petitioner made a short trip to Tijuana, Mexico, remained one day and returned to the United States at San Ysidro, a port of entry, presented his birth certificate together with his Selective Service registration certificate, to officers in charge of said port, and was thereupon denied permission to enter the United States as an American citizen; that he was advised that "he could return to said port of entry and make application for entry in the month of February, 1947"; that he did return to said port on February 19, 1947. He alleged that a hearing was held before a Board of Special Inquiry of the Immigration Service, and at the conclusion of said hearing he was denied permission to enter the United States and was excluded therefrom (Tr. 6-7).

Petitioner remained in the Republic of Mexico until the 20th of March, 1947, again presented himself to the officers of the Immigration Service at San Ysidro, and was permitted to enter upon his claim of United States citizenship. Petitioner remained in the United States until February of 1951, and at that time journeyed to Tijuana to visit with relatives, and remained approximately 5 days. Upon his return he was again denied permission to enter as a native born constitutional citizen. Thereafter he returned to said port of entry at San Ysidro and entered the United States on or about September 21, 1951, and since that time has lived and resided in the United States and now resides at Gardena, California (Tr. 7).

Petitioner further alleged that his exclusion from the United States and the denial of his rights and privileges as a citizen occurred at hearings conducted before the Immigration Service in 1947 and 1951, prior to the enactment of section 1503, Title 8, U.S.C.A. He further alleged that his status as a national of the United States "is not now in issue in any pending exclusion proceedings and did not arise by or in connection with any exclusion proceedings or is an issue in any such exclusion proceedings since the enactment of said Section 1503 of Title 8, U.S.C.A., which statute became effective on December 26, 1952" (Tr. 8-9). He prayed for a declaration of citizenship and for such other relief as to the court may seem proper.

To his petition the respondents moved to dismiss under Rule 12(b) (1), (2), (6), Federal Rules of

Civil Procedure, on the grounds (1) lack of jurisdiction over the subject-matter; (2) lack of jurisdiction over the person; and (3) failure to state a claim upon which relief can be granted (Tr. 10-11).

In support of said motion respondents filed an affidavit of Albert Del Guercio, who alleged that he was the officer in charge of the Immigration and Naturalization Service at Los Angeles; that "petitioner was excluded from admission to the United States by a Board of Special Inquiry at San Ysidro, on February 19, 1947, after a full fair hearing on the ground that he was an immigrant alien who did not have in his possession a valid immigration visa as required by the Immigration Act of May 26, 1924 * * * *he having expatriated himself* as a citizen of the United States under the provisions of Section 401(j) of the Nationality Act of 1940, as amended, by remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency, for the purpose of evading or avoiding training and service in the land or naval forces of the United States" (Tr. 12-13). It further appears from said affidavit that an appeal was perfected to the Commissioner of Immigration, who on March 25, 1947 affirmed the excluding decision of the Board, and that on March 31, 1947 the Commissioner's order was affirmed by the Board of Immigration Appeals (Tr. 13).

Upon the record thus presented to the District Court the Honorable W. M. Byrne, Judge, ordered that the petition for declaratory judgment and for

determination of United States citizenship be dismissed for failure to state a claim upon which relief can be granted (Rule 12 (b)(6), Federal Rules of Civil Procedure) (Tr. 15-16). An appeal was thereupon perfected to this Honorable Court.

QUESTIONS PRESENTED.

(1) Whether the 1952 Act (66 Stat. 163) deprives petitioners of their right under the 1940 Act to have the issue of their citizenship, which had arisen in exclusion proceedings, decided in actions for declaratory judgment.

(2) Is that portion of section 360(a) which deprives a native born citizen of the United States of his right to a judicial determination of his citizenship, where such person's status as a national of the United States (a) arose by reason of or in connection with any exclusion proceedings under the provisions of this or any other Act, or (b) is in issue in any such exclusion proceedings, constitutional?

ARGUMENT.

I.

The first question presented for determination by this Court has been decided adversely to the Government's position in the very recent case of *Wong Kay Suey v. Brownell,* 227 Fed. (2d) 41, United States Court of Appeals, District of Columbia Circuit.

The Court, speaking through Justice Edgerton, determined that the savings clause of the 1952 Act, Section 405(a) was broad enough to cover plaintiff's rights under the 1940 Act "to sue for declaratory judgment". The language follows:

> "We take Sec. 360(a) to mean that no right to have the issue of citizenship determined in a suit for a declaratory judgment shall arise in the future, if the issue of citizenship arose in connection with exclusion proceedings. In view of the savings clause, we do not take Sec. 360(a) to mean that an existing right to sue for a declaratory judgment shall be cut off.
>
> Our view of the case makes it unnecessary to decide whether the plaintiffs are 'within the United States' in the sense in which Sec. 360(a) uses that term. Unless they are, the section does not apply to them at all. Even if they are, it does not bar their present suits.
>
> We think the District Court erred in holding that it lacked jurisdiction."

> "The general language in this savings clause operates 'unless otherwise specifically provided' in the Act. This exception does not cover this case. Nowhere in the 1952 Act is it 'specifically provided' that if the issue of citizenship has arisen in an exclusion proceeding, a right already accrued under the 1940 Act, to have the issue decided in an action for a declaratory judgment, shall be cut off."

In view of the fact that the decision is directly in point on this issue presented by the instant case, we

respectfully direct this Court's attention to the entire reasoning of the opinion.

Section 903 of Title 8, U.S.C.A., in full force and effect on the date of petitioner's exclusion from the United States, provided in part as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States."

The denial of petitioner's rights as a citizen of the United States occurred, as alleged in the petition, in the years 1947 and 1951. Section 360(a) was not effective at that time and did not become effective until December 26, 1952. The 1952 Immigration and Nationality Act did not deprive petitioner under this section of his right under the 1940 Nationality Act to have the issue of his citizenship, *which had arisen in exclusion proceedings under the 1940 Act,* decided in an action for declaratory judgment (*Suey v. Brownell, supra; Shung v. Brownell,* 227 Fed. (2d) 40).

II.

That portion of section 360(a) which deprives a citizen of the United States of his right to a judicial determination of his citizenship "if the issue of such person's status as a national of the United States (a) arose by reason of or in connection with any exclusion proceedings under the provisions of this or any other act, or (b) is in issue in any such exclusion proceedings" is unconstitutional.

Due process guaranteed by the fifth amendment of the Constitution of the United States requires that a substantial constitutional claim of citizenship be afforded a judicial trial, and the denial of such right of judicial determination of citizenship cannot constitutionally be applied to one who is a resident of the United States.

Exclusion orders have no finality when such orders affect the constitutional guarantee of the fourteenth amendment, insofar as such guarantees are applicable to the rights created by citizenship at birth under such amendment, and such denial of citizenship affects one who is residing in the United States.

The practical effect of the operation of section 360(a), supra, is to leave the final determination of a constitutional guarantee of citizenship to a purely ministerial or administrative board or official. If a native born citizen leaves the United States, and upon his return an immigration official affords a perfunctory hearing and determines that he is not a

citizen, that decision is final and cannot be reviewed on a trial de novo by the courts. This cannot be the law of the land.

Immigration officials cannot constitutionally exclude a native born citizen of the United States. When such act does occur, what remedy or relief may such person so excluded seek in the courts if section 360(a), supra, is constitutional? Clearly, a native born citizen cannot be either excluded or deported. The Immigration and Naturalization Service has no jurisdiction, either to exclude or deport, any person unless and in fact he is an alien. The determination of this jurisdictional fact of course must be determined by the Immigration Service in the first instance in exclusion proceedings, where one who claims to be a citizen seeks to enter as a native born citizen. When a person makes a claim of citizenship, supported by evidence of birth in the United States, and is thereupon excluded, he is constitutionally entitled to a judicial determination de novo of his claim of citizenship.

If the courts are to literally follow the interpretation of section 360(a), that no person can maintain an action as a citizen of the United States, where his rights and privileges as such citizen are denied by any department, or agency, or official thereof, on the ground that he is not a national of the United States and where the status of said citizenship is in issue in any exclusion proceedings, or arose by reason of or in connection with any ex-

clusion proceedings, the same would be a direct violation of Article III and the 14th amendment of the Constitution of the United States.

The denial of such judicial determination of citizenship would, indeed, be disturbing and shocking. Congress has seen fit to place the final determination of citizenship, even though a person may be a resident of the United States, if his status arose by virtue of any exclusion proceedings, or is in issue in any exclusion proceedings, in a purely administrative or ministerial officer.

The right of citizenship is the most highly prized possession to be left to the whim of a purely executive officer, without hope or chance of a judicial determination. This surely is an abridgement upon the jurisdiction and powers of the Courts of the United States and should never be sanctioned or approved.

The following cases support petitioner's position:

In re Ng Fung Ho v. White, 259 U.S. 276, 42 Sup. Ct. 492;

Carmichael v. Delaney, 170 Fed. (2d) 239;

Lee Fong Fook v. Wixon, 170 Fed. (2d) 245;

Bilokumsky v. Tod, 263 U.S. 149, 152;

Kessler v. Strecker, 107 U.S. 22, 34, 59 Sup. Ct. 64;

Bridges v. Wixon, 326 U.S. 135;

Fat v. White, 253 U.S. 454.

In depriving a person of his American citizenship, the courts have uniformly held that the Government must be held to a strict degree of proof and to prove

such loss by clear, unequivocal and convincing evidence and not by a preponderance.

Gonzales v. Landon, U.S. Supreme Court, No. 111, October Term, 1955, Dec. 12, 1955.

CONCLUSION.

Appellant prays that the judgment of the District Court be reversed.

Dated, Los Angeles, California,
February 15, 1956.

DAVID C. MARCUS,
Attorney for Appellant.